

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Maltreatment  
Determination and Order to Forfeit a Fine  
for New Horizon Child Care Center

**ORDER ON NEW HORIZON'S  
MOTION TO COMPEL**

The above matter is pending before the Administrative Law Judge Barbara L. Neilson pursuant to a Notice of and Order for Pre-Hearing Conference May 2, 2006. On August 11, 2006, New Horizon Child Care Center filed a Motion to Compel. On August 21, 2006, the Department filed a Response in Opposition to the Motion.

Thomas J. Hunziker, Attorney at Law, Dunkley and Bennett, P.A., Suite 700, 701 Fourth Avenue South, Minneapolis, Minnesota 55415, appeared on behalf of New Horizon Child Care Center, Inc. ("New Horizon"). Jonathan Geffen, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department of Human Services ("DHS" or "the Department").

Based upon all of the files, records, and proceedings in this matter, and for the reasons discussed in the attached Memorandum,

IT IS HEREBY ORDERED as follows:

1. New Horizon's motion to compel responses to its document requests is DENIED.
2. New Horizon's motion to compel specified DHS employees to appear for depositions is DENIED.

Dated: September 15, 2006.

/s/ Barbara L. Neilson  
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BARBARA L. NEILSON  
Administrative Law Judge

**MEMORANDUM**

This case involves New Horizon's challenge to the Department's determination that New Horizon committed maltreatment by neglect under Minn. Stat. § 626.556, subd. 2(c)(1) and (2), on two separate occasions (May of 2004

and February of 2005) when children in its care in two different facilities sustained dislocated elbows. The Department determined that the 2004 injury was likely caused by an assistant teacher swinging the child by the arms and the 2005 injury was likely caused by a teacher pulling the child by the arm. The Department asserted that it issued an Alert in August 2002 informing license holders that it had investigated a number of reports during 2001 and 2002 involving children receiving dislocated elbows in childcare centers as a result of staff lifting or pulling children by the wrist or hand. The Alert noted that the likelihood of this type of injury occurring could be reduced by never pulling or swinging children of any age by their arms or wrists, and concluded by asking license holders to “alert your staff to the danger of dislocated elbows and take steps to prevent these types of incidents.”<sup>1</sup> After investigation, the Department found that New Horizon was culpable of maltreating two minors in its care based upon its failure to adequately notify and train its staff regarding the possibility of elbow dislocations resulting from lifting or pulling children by the hands or wrists, and imposed a \$2,000 fine (\$1,000 for each violation). New Horizon filed an appeal, resulting in the initiation of the present contested case proceeding.

In its motion to compel, New Horizon seeks to take the depositions of six employees<sup>2</sup> of the Department of Human Services as well as receive full responses to a document request it served on August 1, 2006. In the document request, New Horizon sought copies of alerts and other communications provided by DHS to new child care license holders in 2001-2006, copies of incident reports provided by license holders in 2001-2006 relating to dislocated elbows, and copies of maltreatment determinations in 2001-2006 involving dislocated elbows and child care licensees or staff persons. New Horizon asserts that no statute or rule requires training of staff persons regarding dislocated elbows and wishes to undertake discovery on “the retroactive application of a non-rule to its staff persons where the penalties imposed by the DHS are as harsh as a finding of maltreatment.”<sup>3</sup> New Horizon relies on the general rules of discovery applicable to contested case proceedings which are found at Minn. R. 1400.6700 in support of its argument that it should be able to obtain discovery relevant to the subject matter of the claim, including deposition testimony, to prepare its defense.

The Department argues that the general discovery provisions set forth in Minn. R. 1400.6700 do not apply in this proceeding and that, in any event, New Horizon has failed to show that its document and deposition requests are needed for the proper presentation of its case or that the issues and amounts in controversy are significant enough to warrant such extensive discovery. It contends that the document requests are overbroad and unduly burdensome in light of the needs of the case, the amount in controversy, limitations on the

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<sup>1</sup> *Id.* (emphasis in original).

<sup>2</sup> New Horizon originally noticed the depositions of seven employees, but apparently is no longer seeking to depose Cynthia Gagne. See Notice of Motion.

<sup>3</sup> Memorandum in Support of Motion at 6.

parties' resources, and the importance of the issues at stake, and that New Horizon has not shown that each of the depositions it is seeking is needed for the proper presentation of its case. The Department asserts that New Horizon seeks to expand the scope of this case well beyond the issue of whether New Horizon committed maltreatment at the two facilities in question and that information provided to new child care license holders is irrelevant here since neither of the two New Horizon facilities involved were new licensees. It also contends that New Horizon's request for six years of incident reports encompasses private data under the Minnesota Government Data Practices Act. The Department points out that it has already provided New Horizon with its entire investigation file, including compact disks with audio recordings of interviews conducted by DHS investigators. The Department also indicated that it will provide copies of the public maltreatment determinations involving dislocated elbows for the years 2001 through 2006 despite its belief that these documents are not relevant to whether New Horizon committed maltreatment against children in its care, and will promptly provide New Horizon with any other documents if it decides to provide additional evidence in this matter.

Where, as here, a maltreatment determination is the basis for a licensing sanction under Minn. Stat. § 245A.07, state law specifies that the license holder "has a right to a contested case hearing under chapter 14 [the Minnesota Administrative Procedure Act] and *Minnesota Rules, parts 1400.8505 to 1400.8612*."<sup>4</sup> The rules referenced in the statute are known as the Revenue Recapture Rules. The rules were originally adopted to govern hearings arising under the Revenue Recapture Act, but also were intended to apply to "other hearings as directed by statute."<sup>5</sup> These rules provide streamlined procedures as compared to the more typical rules governing contested case proceedings that are set forth in Minn. R. 1400.5100 through 1400.8401. The differences between the two sets of rules are very evident when the rules regarding discovery are compared. The Revenue Recapture rule on prehearing discovery states in its entirety as follows:

A party may demand that any other party disclose the names and addresses of all witnesses that the other party intends to have testify at the hearing. The demand shall be in writing and shall be directed to the party or the party's attorney. Responses to the demand shall be served within ten days of receipt of the demand. Any witnesses unknown at the time of the disclosure shall be disclosed as soon as they become known. Any party that unreasonably fails to make a requested disclosure shall not be allowed to call the witness at hearing.<sup>6</sup>

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<sup>4</sup> Minn. Stat. § 626.556, subd. 10i(f) (emphasis added).

<sup>5</sup> Minn. R. 1400.8505.

<sup>6</sup> Minn. R. 1400.8600.

In contrast, the more typical contested case rule governing discovery is much more expansive:

**Subpart 1. Witnesses; statement by parties or witnesses.**

Each party shall, within ten days of a written demand by another party, disclose the following:

A. The names and addresses of all witnesses that a party intends to call at the hearing, along with a brief summary of each witness' testimony. All witnesses unknown at the time of said disclosure shall be disclosed as soon as they become known.

B. Any relevant written or recorded statements made by the party or by witnesses on behalf of a party. The demanding party shall be permitted to inspect and reproduce any such statements.

C. All written exhibits to be introduced at the hearing. The exhibits need not be produced until one week before the hearing unless otherwise ordered.

D. Any party unreasonably failing upon demand to make the disclosure required by this subpart may, in the discretion of the judge, be foreclosed from presenting any evidence at the hearing through witnesses or exhibits not disclosed or through witnesses whose statements are not disclosed.

**Subp. 2. Discovery of other information.** Any means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed. If the party from whom discovery is sought objects to the discovery, the party seeking the discovery may bring a motion before the judge to obtain an order compelling discovery. In the motion proceeding, the party seeking discovery shall have the burden of showing that the discovery is needed for the proper presentation of the party's case, is not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant the discovery. In ruling on a discovery motion, the judge shall recognize all privileges recognized at law.<sup>7</sup>

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<sup>7</sup> Minn. R. 1400.6700, subp. 1 and 2. The rule goes on in subparts 3-5 to authorize the Administrative Law Judge to impose certain sanctions for noncompliance with discovery orders, permit the entry of protective orders, and address issues relating to the filing of discovery requests.

Minn. Stat. § 626.556, subd. 10i(f), makes it clear that the discovery provision contained in the Revenue Recapture rules (Minn. R. 1400.8600) is to be applied to appeals of maltreatment cases rather than the broader discovery rule that is generally applicable to contested case proceedings. Given the limited nature of the discovery authorized by the Legislature in these proceedings, there is no proper basis to expand the scope of discovery in the manner urged by New Horizon.<sup>8</sup> Accordingly, the motion to compel must be denied, and there is no need to reach the further issue of whether the requested discovery would be permissible if the standards set forth in Minn. R. 1400.6700 were applicable.

**B. L. N.**

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<sup>8</sup> The Department is to be commended for agreeing to allow more expansive discovery in this case than is strictly required by the Revenue Recapture rules.